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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

## *Oakland*

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## MEMORANDUM

Plaintiff respectfully requests this Court to deny the motion to dismiss on all 8 questions posed in that motion. *See* §2 of Mot. to Dismiss at 2-3. Authorities that Defendants cited have been overturned or come from unreported cases specific to that case. For example, in *Drevaleva v. Dep’t of Veterans Affairs*, 835 F. App’x 221, 223 (9th Cir. 2020) (an unpublished decision) by a plaintiff this Court has declared to have a “long history of repetitive and abusive lawsuits.”

## I. Federal Rules of Civil Procedure (FRCP) 8

FRCP 8 only requires ““a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957). A complaint should not be dismissed unless it is "beyond doubt that the plaintiff can prove no set of facts" that would entitle the plaintiff to relief and clear that no amendment could save the complaint. *Conley v. Gibson*, 355 U.S. at 45-46; *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). For complex, egregious harassment complaints with many violations of laws, parties, incidents, and identities, there is a trade-off between short and plain requirements.

## (1) The Trade-off Between Short and Plain in Complex Complaints

Trying to strike a balance between clarity and brevity despite the complexity of the case, Plaintiff tried to conserve space while listing facts that satisfy the elements of proof. The listed facts were not unnecessary duplications as Defendants claim, but rather, multiple claims had the same required *prima facie* elements (e.g., Plaintiff's protected bases). If all claims were separated by law, protected class, and specific incidents or adverse actions—as the Defendants wish—the resulting complaint would be an unwieldy document encompassing over 140,000 claims (using the formula to calculate combinations  $(2 \cdot n - 1)! / (n! \cdot (n - 1)!)$ ). The complexity of the case—its intersectionality, number of violations of law per incident, and number of incidents and parties—makes it challenging to convey claims concisely. Therefore, a 20–25-page complaint in the format Defendants desire is unrealistic.

1           Adding (even by reference) descriptions of which facts match which element of proof as  
 2 Defendants wish could add at least 18 pages per element or 100 extra pages if each discrete event  
 3 had its own claim. Further limiting each claim to one law would multiply the number of pages  
 4 severalfold beyond the 100 extra pages. These conservative calculations are based on  
 5 Defendants' own evaluation of four *prima facie* elements in a disparate treatment claim, five  
 6 lines per element (at a minimum of one sentence plus a citation sentence), and at least 100  
 7 incidents to equal 20 lines per claim (i.e.,  $\geq 1$  page per claim). *See* Def.'s Mot. to Dismiss at 20.

8           **(2) Intersectionality of Claims**

9           Intersectional identities cannot be easily disentangled from each other. For example, it is  
 10 hard to classify discrimination against Catholic priests as only gender discrimination or only  
 11 religious discrimination because Catholic priests are by definition men. Stereotypes are also not  
 12 the same when considering intersectional identities compared to solo identities (e.g., Black  
 13 women or pregnant women versus all women). Research also shows that (in choosing their  
 14 victims) perpetrators of discrimination account for the intersectionality or level of vulnerability  
 15 of the victim. *See* Eros DeSouza, *Frequency Rates & Correlates of Contrapower Harassment in*  
 16 *Higher Educ.*, *JOURNAL OF INTERPERSONAL VIOLENCE*, 26(1), 158–188 (2011); Meredith  
 17 Newman, et al., *Sexual Harassment in the Fed. Workplace*, *PUB. ADMIN. REVIEW*, 63(4), 472-  
 18 483 (2003). Further discovery could reveal the scope, intent, and specifically targeted  
 19 combination of identities behind specific incidents. Plaintiff has some examples from the FEMA  
 20 Office of Chief Counsel (OCC) of differential treatment between women of color who engaged  
 21 in protected activity, all women, and white men who had not engaged in protected activity where  
 22 women of color who engaged in protected activity faced the harshest treatment while white men  
 23 who did not engage in protected activity faced no consequences. However, discovery could  
 24 reveal more data showing which specific combination of identities Defendants targeted. Plaintiff  
 25 is currently not available to Plaintiff because FEMA has refused to conduct an investigation as it  
 26 was required to do so in the formal Equal Employment Opportunity (EEO) complaints process  
 27 nor any other internal agency investigation and the Equal Employment Opportunity Commission  
 28

1 (EEOC) declined to order one as well. *See* 29 C.F.R. § 1614.108(a) (“The investigation of  
2 complaints shall be conducted by the agency against which the complaint has been filed.”).

3       **(3) Defendants Violated Multiple Laws per Incident**

4       Many times, one event violated multiple laws, complicating the drafting of the First  
5 Amended Complaint (FAC). Aside from harassment claims, Plaintiff is willing to separate out  
6 one violation of law per claim, particularly for laws with prima facie elements that differ a lot  
7 from each other. However, doing so will significantly increase the number of claims and length  
8 of the complaint. Claims simply could be redrafted with subparts for each law in issue (e.g.,  
9 Claim 1(a) for the Rehabilitation Act and 1(b) for the Civil Rights Act of 1964, especially for  
10 overlapping laws with mostly the same prima facie elements (e.g., retaliation or disparate under  
11 the Rehabilitation Act and Civil Rights Act) or mirror prima facie elements (e.g., Plaintiff’s  
12 employer forbade Plaintiff from exercising rights to take leave under the FMLA or  
13 Rehabilitation Act concurrently, only consecutively). *See* 42 U.S.C. §§ 2000d & 2000e et seq.;  
14 29 U.S.C. §§ 2601 et seq., as amended; 5 U.S.C. §§ 6381-6387; 29 U.S.C. § 701 et seq.. Even if  
15 Plaintiff were to separate out one law per claim, it is not clear what Defendants expect Plaintiff  
16 to do where one law (e.g., 42 U.S.C. §1983) provides jurisdiction to sue for violations of another  
17 law (e.g., 1st Amendment). *See* § II(5)(d) below, and *Ariz. Students’ Ass’n v. Ariz. Bd. of  
18 Regents*, 824 F.3d 858, 867 (9th Cir. 2016).

19       **(4) Specific Format of Claims Not Required**

20       The claims are labeled: specifically identifying the issues and clearly articulating the  
21 relevant legal theories and themes. Adhering to Defendants’ demands would only increase the  
22 length of the complaint. Defendants’ demands for a specific format are not required: keeping one  
23 law per claim, chronological order, or matching defendants to claims. Defendants’ own recitation  
24 of the prima facie elements shows that prima facie elements are not in chronological order. The  
25 FAC used chronological order (e.g., timeline) where feasible and logical. Although Plaintiff did  
26 not need to specify which Defendant committed each wrongful act before discovery unveils  
27 additional facts, the FAC specifically named or identified individuals responsible by their job  
28 classifications where possible. *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002). Because

1 complaints are not persuasive pleadings, Plaintiff does not need to show how statements or facts  
 2 relate to each element of proof but only needs to list the facts that support each element of proof  
 3 because the Court and parties are already familiar with the relevant legal standards. For example,  
 4 the complaint should be able to reference by incorporation that Asian is a race without repeating  
 5 the fact per claim, or even list Asian is a race as Defendants should be able to figure out how the  
 6 fact “Asian” is a race, a protected basis, and an element of proof in discrimination claims. The  
 7 Rehabilitation Act and Civil Rights Act of 1964 refer only to certain protected classes, so it is  
 8 evident which listed protected classes match which laws. *See* 29 U.S.C. § 701 et seq.; 29 C.F.R.  
 9 § 1614.203; 42 U.S.C. §§ 2000e et seq.; 29 C.F.R. Parts 1604 and 1606. Therefore, the FAC  
 10 meets the conditions of FRCP 8 and effectively communicates the allegations.

## 11 **II. Subject Matter Jurisdiction FRCP 12(b)(1)**

12 “A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if, considering the  
 13 factual allegations in the light most favorable to the plaintiff, the action: (1) does  
 14 not arise under the Constitution, laws, or treaties of the United States, or does not  
 15 fall within one of the other enumerated categories of Article III, Section 2, of the  
 16 Constitution; (2) is not a case or controversy within the meaning of the Constitution;  
 17 or (3) is not one described by any jurisdictional statute.”

18 *NWDC Resistance & Coal. Whites v. Immigration & Customs Enft*, 493 F. Supp. 3d 1003, 1008  
 19 (W.D. Wash. 2020). This case meets none of the requirements that require a case dismissal under  
 20 FRCP 12(b)(1) as a case involving federal questions and the US government.

21 In addition to § II of the FAC (titled “JURISDICTION”) that describes some of the  
 22 Court’s bases of jurisdiction, the following sections will further discuss several reasons why this  
 23 case should not be dismissed for lack of subject matter jurisdiction, including when sovereign  
 24 immunity does not apply or when it has been waived for specific laws. FAC at 4-5. Even if the  
 25 Court determines it lacks subject matter jurisdiction over certain claims per certain laws, rules of  
 26 construction require courts to interpret, where possible, claims under laws within their  
 27 jurisdiction in a manner that does not conflict with other laws, including those over which the  
 28 Court lacks jurisdiction. *See Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep’t*, 394

1 F.3d 780, 790 (9<sup>th</sup> Cir. 2008). Since Defendants have not challenged the subject matter  
 2 jurisdiction of the Civil Rights Act of 1964 and the Rehabilitation Act, they will not be discussed  
 3 here, and it is assumed that they are not challenging jurisdiction for those laws.

4 (1) All Violations of Laws Regardless of Classification as Discrimination Claims  
 5 Should be Adjudicated

6 All violations of law, regardless of whether they are classified as discrimination claims,  
 7 must be adjudicated. Federal courts have the right to hear issues of federal questions. 28 U.S.C.  
 8 §1331. Actions with the same facts can violate multiple laws without being considered  
 9 discrimination. “Title VII does not preclude separate remedies for unconstitutional action other  
 10 than discrimination based on race, sex, religion, or national origin.” *White v. Gen. Servs. Admin.*,  
 11 652 F.2d 913, 917 (9th Cir. 1981). “Title VII is not the exclusive remedy for federal employees  
 12 who suffer ‘highly personal’ wrongs, such as defamation, harassing phone calls, and physical  
 13 abuse.” *Arnold v. U.S.*, 816 F.2d 1306, 1311 (9th Cir. 1987). Furthermore, “the ability to  
 14 characterize the ultimate harm suffered as including a lesser offense (*i.e.*, battery or  
 15 discrimination) does not change the nature or extent of the ultimate harm. When the harm  
 16 suffered involves something more than discrimination, the victim can bring a separate claim.”  
 17 *Brock v. U.S.*, 64 F.3d 1421, 1423 (9th Cir. 1995). As noted in *Brock*, “for cases in which the  
 18 United States negligently supervised, it could escape liability for damages if the misconduct at  
 19 issue was both assaultive and discriminatory, but not if it was solely assaultive. This result would  
 20 turn Title VII on its head.” *Id.* at 1423. Constitutional and other statutory claims have coexisted  
 21 with discrimination claims for government employees in this circuit. The court in *Ballou v.*  
 22 *McElvain* permitted claims under the 1st Amendment, the Equal Protection Clause, Title VII,  
 23 and 42 U.S.C. § 1343 to proceed together for a government employee suing the government  
 24 employer and another government employee in his individual capacity. *Ballou v. McElvain*, 29  
 25 F.4th 413 (9th Cir. 2022). These decisions illustrate how constitutional, statutory, or regulatory  
 26 violations should not be dismissed merely because they coincide with discrimination claims.

27 Conflating all claims into a singular category of discrimination obscures broader  
 28 violations. It glosses over the difference between the behavior alleged (e.g., sexist jokes) and

1 how others adjudicated or processed the complaint (i.e., due process violations or discriminatory  
 2 decisions). While some events violate multiple laws and various laws overlap, laws differ as to  
 3 their definitions and standards for liability and their remedies. For example, FMLA claims are  
 4 based on serious health conditions, not race (like the Civil Rights Act of 1964 covers), nor  
 5 disability (which the Rehabilitation Act covers). *See* 42 U.S.C. §§ 2000e et seq.; 29 U.S.C. §§  
 6 2601 et seq., as amended; 5 U.S.C. §§ 6381-6387; 29 U.S.C. § 701 et seq.. Statutes themselves,  
 7 EEOC policy documents, and MOUs between agencies show that the Rehabilitation Act and  
 8 Civil Rights Act do not limit claims under the FMLA and other laws, so Defendants should be  
 9 estopped from making claims contrary to US government policy. *See e.g., Mem. of*  
 10 *Understanding Between US OSC & EEOC*, [https://www.eeoc.gov/mou/memorandum-understanding-between-us-office-special-counsel-and-equal-employment-opportunity \(1988\)](https://www.eeoc.gov/mou/memorandum-understanding-between-us-office-special-counsel-and-equal-employment-opportunity-(1988));  
 11 EEOC, *The Family & Med. Leave Act, the ADA, & Title VII of the Civil Rights Act of 1964*,  
 12 EEOC-NVTA-1995-1 (November 1, 1995)

14       Conflating all claims would also provide a dangerous incentive for perpetrators where  
 15 lesser misconduct would have a proportionally greater punishment than more egregious conduct.  
 16 It would also take away victims' full rights to their remedies and make them bear the  
 17 responsibility for the misdeeds of perpetrators instead of being made whole with a partial  
 18 remedy, if any. *See* Amend. I (right to petition) & V (takings). FEMA absolutely considered the  
 19 amount of damages for legal cases. Even if morality did not stop Defendants from refraining  
 20 from engaging in misconduct, at least they should not be incentivized to engage in the conduct.

21       Defendants' attempt to bar judicial review over constitutional claims disregards the  
 22 supremacy of the Constitution by dismissing constitutional claims in favor of statutory ones. The  
 23 Constitution represents a higher law than statutory provisions. Thus, statutes may not permit  
 24 violations of the Constitution, must not exceed the scope granted by the US Constitution, and  
 25 should not be interpreted in a way that permits the violation of other laws. *See Ctr. for Bio-*  
 26 *Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 394 F.3d at 790.

27       In this case, it would also not make sense to dismiss all claims except for under Title VII  
 28 of the Civil Rights Act, Rehabilitation Act, or the FMLA because some of the instances alleged

1 affect other titles (Title VI), touch on Plaintiff's rights as a US citizen, or occurred after she was  
 2 no longer employed at FEMA. Doing so would create the same perverse situation described in  
 3 *Brock* that those who discriminate against others could avoid liability for all claims except  
 4 discrimination but those who do not discriminate but violate the same non-discrimination laws  
 5 could be held liable for the violation of those laws. *Brock v. U.S.*, 64 F.3d at 1423.

6 For example, all citizens have the right to make a FOIA or Privacy Act request. See 5  
 7 U.S.C. §§ 552 and 552a. Plaintiff's rights to make FOIA and Privacy Act requests are separate  
 8 from her employment status at FEMA. Although the EEOC ordered (on April 28, 2022) that  
 9 FEMA retroactively extend (on paper) Plaintiff's employment until August 2020, Plaintiff was  
 10 no longer working at FEMA (i.e., a private citizen) in 2020 or 2022 when she requested via  
 11 FOIA the video recordings related to her discrimination cases against FEMA. While denying  
 12 Plaintiff access to information because she engaged in protected activity would be part of a claim  
 13 of continuing harassment based on Title VII (while she was a private citizen), disparate treatment  
 14 or disparate impact would be based on Title VI (not Title VII) of the Civil Rights Act of 1964 (if  
 15 the EEOC does not again retroactively extend her employment) and other related laws, such as  
 16 the Privacy Act, FOIA, and 28 U.S.C. § 1343. Title VII, FMLA, and the Rehabilitation Act  
 17 would not be sufficient for the FOIA/Privacy Act and post-FEMA-employment instances  
 18 because Plaintiff would have no recourse to exhaust her administrative remedies internally as she  
 19 and Mr. Scott were no longer FEMA employees. For both cases, if the Court were to dismiss all  
 20 claims except for under Title VII of the Civil Rights Act, the Rehabilitation Act, and FMLA, it  
 21 would reach an absurd result of denying rights all citizens have without any recourse just  
 22 because they engaged in protected activity or were part of certain protected classes. Such a  
 23 dismissal would circumvent the purpose of these laws and their anti-retaliation anti-interference  
 24 provisions. *Brock v. U.S.*, 64 F.3d at 1423. Therefore, it is essential that all violations of law,  
 25 regardless of their categorization, be recognized and adjudicated.

26 **(2) Claims against Individual Defendants Should Proceed**

27 This case goes beyond just holding FEMA/DHS accountable. Even if they no longer  
 28 work at FEMA, individual actors who violated Plaintiff's rights must learn to act differently, be

1 accountable for their actions, and not continue to harm Plaintiff anytime anywhere. They also  
 2 should not evade liability for all time because they once used to work for the government. These  
 3 individual Defendants are being sued for actions taken both during and after their employment at  
 4 FEMA/DHS. For example, Robert Scott lied at the 2020 EEOC hearing and defamed Plaintiff  
 5 after they both had already left the agency. FEMA has stated it would not take action related to a  
 6 former employee, which perpetuates a culture of harassment because the agency refuses to  
 7 correct past harm. Allowing claims against individuals to proceed is the only way to ensure  
 8 accountability and prevent future harm as harassment against Plaintiff did not stop when she  
 9 switched supervisors and locations, and even when she left the agency.

10 It is well-established that plaintiffs can bring claims, such as tort, FMLA, Title VII, 42  
 11 U.S.C. § 1983, and constitutional claims, against individuals working for the US government. In  
 12 *Brock v. U.S.*, the 9th Circuit confirmed that the government conceded this issue, meaning it  
 13 should be estopped from now adopting a contradictory stance. *Brock v. U.S.*, 64 F.3d at 1423.  
 14 Under § 1983, individuals can be sued in their personal capacities for violating constitutional or  
 15 statutory rights. Cases have found that “persons” subject to § 1983 liability include individuals,  
 16 municipalities, and other local governing bodies. *See Devereaux v. Abbey*, 263 F.3d 1070, 1074  
 17 (9th Cir. 2001) (en banc) (sued in individual capacity); *Hartmann v. Cal. Dep’t of Corr. &*  
 18 *Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013) (sued in official capacity). The US Supreme Court  
 19 has held that government officials may be sued individually for injunctive relief when they  
 20 violate constitutional rights, even if the government itself is immune from suit. *See Ex parte*  
 21 *Young*, 209 U.S. 123 (1908). Similarly, federal employee plaintiffs may sue individual  
 22 defendants who are federal employees for equitable relief. *AFGE Local 1 v. Stone*, 502 F.3d  
 23 1027, 1036 (9th Cir. 2007). The 9th Circuit recently reaffirmed this principle in *Ballou v.*  
 24 *McElvain*, where it denied qualified immunity to a government employee sued by another  
 25 government employee in a discrimination suit. *Ballou v. McElvain*, 29 F.4th 413 (9th Cir. 2022).  
 26 Therefore, the suit against the named individual Defendants should be able to proceed, especially  
 27 given that some of these Defendants involved have either moved to different agencies or been  
 28 rehired by FEMA given the ongoing risks of harm.

1       Because various agencies repeatedly failed to protect Plaintiff from harassment and other  
 2 harm by these individuals, their dereliction of duty shows the heightened need to sue these  
 3 individuals in their personal capacities. These individual perpetrators must not be allowed  
 4 to inflict further harm wherever they are. Suing FEMA/DHS alone is insufficient because  
 5 individual defendants can evade liability by retiring, quitting, or transferring to new agencies,  
 6 allowing them to continue discriminatory behavior. In *Munoz v. Superior Court of L.A. County*,  
 7 the court held that plaintiffs can sometimes sue state officials for prospective injunctive relief to  
 8 prevent future statutory or constitutional harms. *See Munoz v. Super. Ct. of L.A. Cnty.*, 91 F.4th  
 9 977 (9th Cir. 2024). *See also Ctr. for Biological Diversity v. U.S. Forest Serv.*, 80 F.4th 943 (9<sup>th</sup>  
 10 Cir. 2023). This concern is especially pressing in this case where DHS/FEMA's stance has been  
 11 that they would only respond to Plaintiff's complaints if a current employee directly committed  
 12 battery (not through a weapon or trap), left a mark, and admitted to the action. FEMA has  
 13 repeatedly refused to correct the hostile work environment (HWE) and has maintained that they  
 14 had no proactive duty to protect Plaintiff from her harassers. Instead, FEMA promoted accused  
 15 individuals after Plaintiff escalated her complaints through the chain of command, and none of  
 16 the individuals named in Plaintiff's complaints were trained due to the EEOC's orders for  
 17 training. Neither the EEOC nor FEMA/DHS did anything to ensure that named harassers were at  
 18 least trained nor enforced the EEOC's orders for specialized training relevant to the case.

19       The federal ADR community is small with regular all-government meetings. The Plaintiff  
 20 should not be forced to conduct additional research to avoid working at agencies where her  
 21 former harassers are employed. The only effective way to prevent future harassment is to hold  
 22 these individuals accountable in their personal capacities, ensuring that they (not Plaintiff) face  
 23 consequences for their behavior regardless of their employment status.

24       Even if the Plaintiff's claim against the agency defendants is dismissed, her claims  
 25 against the individual defendants should still proceed. Suing these individuals in their personal  
 26 capacities ensures that the Plaintiff has a path to justice and protection from future harassment,  
 27 retaliation, discrimination, and other violations of the law. *See Ballou v. McElvain*, 29 F.4th 413  
 28 (9th Cir. 2022). In addition, Plaintiff has an interest in pursuing medical tests for these individual

1 defendants, a remedy that would be unavailable if the claims were brought solely against the  
 2 agency. FRCP 35. Without allowing these claims to continue, the Plaintiff would remain  
 3 vulnerable to the same hostile environment that has persisted throughout her case.

4 Some of these Defendants sued in their individual capacities have ties to California as  
 5 attorneys barred in California or supervising attorneys barred in California or other states in the  
 6 9<sup>th</sup> Circuit, thereby falling under California's jurisdiction. Limiting claims to only discrimination  
 7 also risks establishing a dangerous precedent, hindering state bar associations from disciplining  
 8 attorneys for professional responsibility violations, including discrimination, as codified in  
 9 California's Business and Professions Code. *See* Cal. Bus. & Prof. Code §§ 6100-6117 (2023).

10       (3) FTCA Claims

11       Contrary to Defendants' claim, Plaintiff has exhausted all remedies and has the right to  
 12 bring claims based on the FTCA. *See* § VII of FAC.

13           (a) *Defendant as the United States*

14       The Plaintiff is amenable to adding the United States as a defendant if required. Plaintiff  
 15 filed using the names of DHS and FEMA based on the prior representations she received from  
 16 various agencies stating that her employing agency FEMA/DHS would be responsible for all  
 17 claims (including the processing of such claims) even if other agencies or government  
 18 contractors were involved. When Plaintiff tried to add other Defendants (US Department of  
 19 Health and Human Services (HHS) and their contractor) to her subsequent EEOC case against  
 20 FEMA/DHS because FEMA/DHS through an interagency agreement contracted with HHS who  
 21 subcontracted out to a third party, HHS and the EEOC to add any other entity besides  
 22 FEMA/DHS as a Defendant nor process any claims under the theory that the employing agency  
 23 was responsible for liability and processing of all claims. Similarly, OSC claimed that the EEOC  
 24 would process all of Plaintiff's claims (even those not related to discrimination statutes or  
 25 regulations). If the Court allows it, adding the US as a party could help alleviate the bureaucratic  
 26 black hole issue Plaintiff has encountered for other claims as well.

27           (b) *Exhaustion of Administrative Remedies*

Plaintiff has fully exhausted administrative remedies under the legal requirements for filing claims. *See* § VII (Exhaustion of Remedies). The FTCA mandates that claims against the United States must first be presented to the appropriate federal agency. Under 44 CFR Part 11, Subpart B, OCC, or its designee is responsible for addressing FTCA claims once Plaintiff notifies OCC of her allegations. As outlined in § VII of the FAC on the exhaustion of administrative remedies, Plaintiff has duly reported her claims to OCC in several ways: through her OCC chain of command within (first-line supervisors up to Mr. Doolin who in turn reported the matter to Chief Counsel Mr. Sevier), the FEMA Administrative Investigations Division (AID) Team (which includes OCC representatives), to the Office of Equal Rights (who would have an OCC lawyer review the matter), and the Office of Professional Responsibility (who would also likely have an OCC lawyer review the matter), and various other OCC employees, as well as indirectly to the EEOC and DHS Inspector General (IG). *See* FAC § VII at 9. In addition, the perpetrators who worked in OCC would themselves be made aware of the torts because they committed them. Plaintiff's efforts to engage the appropriate offices demonstrate her compliance with the procedural requirements and reinforces her right to proceed with this legal action.

*(c) Right to Sue under the FTCA*

Plaintiff has a right to sue the United States under the FTCA for the negligent supervision of its employees, which led to the harassment and discrimination Plaintiff suffered. As the 9th Circuit held in *Brock v. United States*, if such FTCA claims were barred "for cases in which the United States negligently supervised, it could escape liability for damages if the misconduct at issue was both assaultive and discriminatory, but not if it was solely assaultive." 64 F.3d at 1423. Therefore, FTCA's assault and battery exception does not immunize the government from liability for negligently hiring and supervising an employee. *Brock v. U.S.*, 64 F.3d 1421 at 1425, citing *Bennett v. U.S.*, 803 F.2d 1502, 1504 (9th Cir. 1986). In *Bennett v. U.S.*, the court ruled that FTCA's negligent hiring and supervision claims are valid even when sexual assault is involved, as it is a form of harassment based on sex. *Bennett*, 803 F.2d at 1503-1505. The court in *Bennett* found that the rationale behind the assault and battery exception was for actions beyond the government's control. *Id.* Supervisors lose their immunity for torts when they engage

1 in assault, battery, defamation, and conspiracy to defraud an employee, which are acts beyond  
 2 the outer perimeter of their authority. *Otto v. Heckler*, 781 F.2d 754 (9<sup>th</sup> Cir. 1986).

3       However, in this case, the government had ample opportunity (at least 10 years) and  
 4 several complaints to prevent harassment and discrimination. Plaintiff's allegations involve both  
 5 assault and discrimination, making the government liable for negligent supervision. FEMA/DHS  
 6 negligently hired, retained, and promoted the individual Defendants despite knowledge of their  
 7 previous misconduct and involvement in harassing Plaintiff, despite several background checks,  
 8 warnings, and complaints lodged against perpetrators. By failing to take appropriate action, the  
 9 government perpetuated an HWE. Furthermore, attorneys who violate professional rules of  
 10 responsibility, as well as federal government employees who violate the US Constitution since  
 11 federal employees take an oath to uphold the Constitution, should qualify as acting beyond the  
 12 outer perimeter of their duties. Even if the Court wishes to dismiss the FTCA now, the court in  
 13 *Otto* held that a determination of whether an act exceeds the outer perimeter of their authority  
 14 issues should not be dismissed at the pleading stage. *Otto v. Heckler*, 781 F.2d 754 (9<sup>th</sup> Cir.  
 15 1986). Consequently, the FTCA claim should be allowed to proceed.

16       (4) APA Claims

17       The recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo* underscores  
 18 the judiciary's critical role in reviewing APA cases. 144 S. Ct. 2244 (2024). Federal courts have  
 19 consistently held a "strong presumption favoring judicial review of administrative action." *Mach*  
 20 *Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015). The APA's judicial review provision provides  
 21 that a person suffering legal wrong because of agency action, or adversely affected or aggrieved  
 22 by agency action is entitled to judicial review. *Brnovich v. Biden*, 562 F. Supp. 3d 123, 132 (D.  
 23 Ariz. 2022). The APA itself provides a cause of action for such review and allows courts to  
 24 assess agency actions. *Med. Imaging & Tech. Alliance v. Librarian of Cong.*, 103 F.4th 830  
 25 (D.C. Cir. 2024); 5 U.S.C. § 702. In addition, multiple cases show that the APA waives federal  
 26 sovereign immunity by statute in 5 U.S.C. § 702 and 706. *See Cooper v. Haase*, 750 Fed. App.  
 27 600 (9th Cir. 2019); *Brnovich v. Biden*, 562 F. Supp. 3d at 132. *See also Med. Imaging*, 103  
 28 F.4th 830. Moreover, Congress removed immunity for APA claims Pub. L. 94-574 was passed.

1           Contrary to Defendants' assertions regarding the *Ward v. EEOC* case, Plaintiff here seeks  
 2 the review of a final decision by the EEOC, asserting that the decision was unlawful, an abuse of  
 3 discretion, and violated due process rights. *Ward v. EEOC*, 719 F.2d 311, 313-14 (9th Cir. 1983).  
 4 Plaintiff is contesting an EEOC final decision, not its negligence or indecision. The current case  
 5 is distinguishable from *Ward v. EEOC* where the plaintiff sued the EEOC for failing to act. 719  
 6 F.2d at 313-14. If necessary, Plaintiff is prepared to amend the FAC to include the United States  
 7 or the relevant federal agency as a defendant, reflecting guidance previously received from  
 8 federal agencies. If Plaintiff will be required to add the EEOC as was in the *Ward* as a Defendant  
 9 or simply the United States to cover all actions, then Plaintiff is willing to do so. Plaintiff relied  
 10 on what several agencies had previously told her that her employing agency would be the  
 11 responsible agency for liability and processing complaints (i.e., listed FEMA/DHS but no other  
 12 agencies as the defendant).

13           It is crucial to ensure that federal employees can challenge decisions made in the EEO  
 14 process without unnecessary delays. Prolonged administrative delays or the failure to properly  
 15 adjudicate EEO complaints could impair due process, harm plaintiffs' ability to gather evidence,  
 16 and reduce the effectiveness of remedies. This reinforces the need for judicial review to ensure  
 17 fairness and accountability in the EEO process.

18           (5) Waiver of Sovereign Immunity for Claims Other than under the Civil Rights Act of  
 19 1964 or the Rehabilitation Act

20           Defendants' argument of federal sovereign immunity is prohibited by law, interferes with  
 21 the duty of judicial review of executive action (especially as it relates to the violation of  
 22 fundamental rights and the Constitution), and creates a backdoor to reinstate segregation so that  
 23 some citizens can have and enforce their rights whereas others cannot. "The dynamic of our  
 24 constitutional system is that individuals need not await legislative action before asserting a  
 25 fundamental right." *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015). All of the claims are related  
 26 to the protection of fundamental rights (including civil rights), even if they do not directly violate  
 27 civil rights or are not directly brought under the Civil Rights Act or the Rehabilitation Act. For  
 28 example, Defendants tried to hide evidence of their discrimination and retaliation of Plaintiff by

1 refusing to release documents Plaintiff requested by FOIA/Privacy Act, but FOIA/Privacy Act  
 2 are not facially civil rights statutes as all citizens have the right to request documents. Therefore,  
 3 28 U.S.C. § 1343 would provide jurisdiction for the district court to hear all of the claims.

4 Defendants' argument that only a narrow set of laws have a waiver to immunity does not  
 5 correspond to reality. The 9th Circuit has allowed several claims for employment cases other  
 6 than on only the narrow subset of laws desired by Defendants. *See Ballou v. McElvain*, 29 F.4<sup>th</sup>  
 7 413 (9<sup>th</sup> Cir. 2022). The following sections also demonstrate other cases or statutes that show a  
 8 waiver of immunity or how an authorizing statute is not a prerequisite for judicial review. Even  
 9 if the Court were to find sovereign immunity for the following provisions, immunity would only  
 10 apply to the government agency defendants and not to individual defendants. *See* FAC § II(2).  
 11 See § II(3) for FTCA claims and § II(4) above for APA claims.

12 (a) *A Duty of Judicial Review and the Passage of the US Constitution*  
 13 *(Especially the 1<sup>st</sup> Amendment Right to Petition) Overturns the Pre-Democracy Common Law*  
 14 *Concept of Sovereign Immunity Against Citizens*

15 Defendants' sovereign immunity argument is based on a fundamental misunderstanding  
 16 of the principles of judicial review and the scope of federal court jurisdiction. U.S. CONST. art.  
 17 III § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this  
 18 Constitution, the Laws of the United States...to Controversies to which the United States shall be  
 19 a Party...between Citizens of different States..."). The 1st Amendment provides the right to seek  
 20 redress in court. Amend. I ("the right...to petition the Government for a redress of grievances").  
 21 This right includes the substantive ability to vindicate a legal right and request damages, not just  
 22 file a lawsuit, by the plain language and historical reading of the 1<sup>st</sup> Amendment.

23 If plaintiffs are to reach the redress (i.e., damages) stage of a case, a case cannot be  
 24 dismissed prematurely under FRCP 12(b)(1) at the complaints drafting stage. For the historical  
 25 context and intent of the Right to Petition to ensure no one is above the law and fix prior issues  
 26 with an unresponsive government, *see* James E. Pfander, *Sovereign Immunity & the Right to*  
 27 *Petition: Toward a First Amend. Right to Pursue Judicial Claims against the Gov't*, 91 Nw. U.L.  
 28 REV. 899 (1997) and Benjamin Pener Cover, *First Amend. Right to a Remedy*, 50 UC DAVIS L.

1 REV. 1741 (2017). Dismissing a claim without a decision on the merits and absent a default  
 2 judgment denies plaintiffs their due process rights under the 5<sup>th</sup> and 14<sup>th</sup> Amendments. *See* Erwin  
 3 Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201-1224 (2001). The 1<sup>st</sup>  
 4 Amendment right to petition, combined with the 5<sup>th</sup> and 14<sup>th</sup> Amendments right to due process,  
 5 and 10<sup>th</sup> Amendment (reserving powers all not explicitly granted to the federal government to the  
 6 people or states), indicate that sovereign immunity does not apply against US citizens unless  
 7 there is a constitutional amendment, as happened with the 11<sup>th</sup> Amendment granting sovereign  
 8 immunity to states. *See* Chemerinsky (2001) at 2015; Amend. I, V, X & XI. The term  
 9 “Government” instead of “Congress” was not a mistake because the founding fathers wanted  
 10 citizens to be able to petition all branches of government (including the judiciary). *See* Pfander  
 11 (1997); Pener Cover (2017). Unlike the other two branches of government that can act directly in  
 12 response to petitions, the judiciary must make a finding before offering relief.

13 *Marbury v. Madison* corresponds to this view of a right to relief and upheld the judicial  
 14 review of executive actions, particularly if such actions injured a plaintiff, involved a plaintiff’s  
 15 civil liberties and rights, and the government has a duty. 5 U.S. 137 (1803). Defendants  
 16 effectively are asking the Court to overturn the super-precedential case of *Marbury v. Madison* in  
 17 arguing sovereign immunity that precludes judicial review of executive actions, particularly of a  
 18 constitutional nature where there is a clear duty. *See id. See also* Chemerinsky (2001). This is  
 19 particularly true given the existence of the Mandamus Act, which has the Court enforce a duty,  
 20 because there would be no way to enforce a duty if there were no way to review the duty (i.e.,  
 21 sovereign immunity). 28 U.S.C. § 1361. “[T]he agency bears a ‘heavy burden’ in attempting to  
 22 show that Congress prohibit[ed] all judicial review of the agency’s compliance with a legislative  
 23 mandate.” *Mach*, 575 U.S. 480 at 486 (citing *Dunlop v. Machowski*, 421 U.S. 560, 567 (1975)).  
 24 Defendants have not met this burden.

25 Sovereign immunity should not shield the federal government from judicial review,  
 26 particularly when constitutional rights are at stake and US citizens are bringing claims against  
 27 their own government. *See Marbury v. Madison*, 5 U.S. 137 (1803). The concept of federal  
 28 sovereign immunity came from a pre-democracy common law notion exempting monarchs from

1 lawsuits because of their superiority over their subjects, which the US no longer has. *See*  
 2 Chemerinsky (2001). Signing the US Constitution overturned the sovereign immunity defense in  
 3 suits by citizens against their own governments and a system of placing monarchs at the top of  
 4 the hierarchy. *See id.* As the UK has moved toward more democratic forms of rule, citizens now  
 5 have the right to sue the government. *See* Crown Proceedings Act, 1947, 10 & 11 Geo. 6. c. 44.

6 Sovereign immunity primarily protects sovereigns of equal nature from judging the  
 7 validity of each other's laws or actions rather than helping a sovereign evade accountability to its  
 8 own citizens in a democracy. Sovereign immunity has only been waived where Congress has  
 9 passed a law instituting immunity (e.g., Foreign Sovereign Immunities Act) or where the US  
 10 Constitution (Eleventh Amendment) has specified that it is so, so Congress cannot be said to  
 11 have intended federal sovereign immunity where neither Congress passed a statute nor a  
 12 Constitutional Amendment. *See* 28 U.S.C. §§ 1602 et seq.; U.S. CONST. amend. XI. “[S]ilence is  
 13 far from ‘the clearly discernible will of Congress’.” *Davis v. Passman*, 442 U.S. 228, 247 (1979).  
 14 It is also difficult to believe citizens would want Congress to block a way for them to enforce  
 15 their rights and seek justice. Such a law would also violate the 1st Amendment’s Petition Clause.  
 16 Amend. I. (“the right...to petition the Government for a redress of grievances”). Thus, the  
 17 judiciary must review all cases where immunity is not specified by statute or the US  
 18 Constitution, especially where the laws create a duty.

19 Defendants' argument that sovereign immunity applies here is a misguided attempt to  
 20 undermine the foundational principles of our democracy and the system of checks and balances.  
 21 The US Supreme Court in *Loper* reaffirmed that the judiciary (not the executive branch) has the  
 22 responsibility to determine the law and that deference should not be given to the executive  
 23 branch (not to one faction or a few employees within the executive branch as is the case here) to  
 24 determine the law for all federal employees and all US citizens. 144 S. Ct. 2244, 2248 (2024).  
 25 Federal sovereign immunity removes the duty of judicial review (especially of executive action)  
 26 away from the judiciary and gives deference to the executive branch to determine or interpret the  
 27 law, which *Loper* has explicitly stated is not allowed. *Id.* at 2248. With *Loper*, the check on the  
 28 executive branch has been reaffirmed such that the judiciary has the responsibility to review the

1 actions of the executive branch, which means that a potential remedy for Plaintiff must be  
 2 allowed (i.e., no federal sovereign immunity). *Id.*

3 Specifically as in this case, Congress assigned duties to employers and the federal  
 4 government by giving rights to employees and US citizens, such as through the Bill of Rights  
 5 and FMLA. *Decatur v. Paulding*, reaffirmed by *Loper*, found it is the judiciary's role to  
 6 "interpret the act of Congress, in order to ascertain the rights of the parties." *Decatur v.*  
 7 *Paulding*, 39 U.S. 497, 515 (1840). With *Loper*, cases cited by the defense are now overturned.  
 8 144 S. Ct. 2244 (2024). Therefore, no cases should be dismissed for lack of subject matter  
 9 jurisdiction due to federal sovereign immunity as it would limit the duty of the judiciary to  
 10 review cases. For why sovereign immunity does not apply to Constitutional rights, please see §  
 11 II(5)((d)) below. As for statutory and other legal causes of action besides the Constitution, Courts  
 12 have found that some cases do not require express waivers of sovereign immunity, such as the  
 13 Fair Credit Reporting Act. *Dep't of Agric. Rural Dev. Rural Housing Serv. v. Kirtz*, 601 U.S.  
 14 42 (2024) Therefore, this case should be able to proceed even without a waiver of sovereignty.

15 (b) *Backdoor Return to Segregation*

16 The US government's interpretation of the denial of sovereign immunity (especially for  
 17 FMLA and constitutional amendments) would effectively return the federal workplace to the pre-  
 18 segregation era to shield itself from accountability. It would be a backdoor attempt to reverse  
 19 *Brown v. Board of Education* and reinstate separate but equal. *Brown v. Bd. of Educ.*, 347 U.S.  
 20 483 (1954). The granting of Defendants' motion would effectively dismantle protections for  
 21 federal employees and disproportionately impact minorities, women, those with disabilities, and  
 22 members of other marginalized groups. Employees from these groups could be denied bathroom  
 23 breaks, FMLA leave, sick leave, and other government employee benefits without recourse.

24 Here, individuals mistreating Plaintiff was not an officially stated government policy  
 25 designed to be implemented nationwide because both Plaintiffs and individual Defendants were  
 26 government employees. *See* § II(5)(c) below regarding government policy. Federal employees  
 27 take oaths of office to uphold (not violate) the US Constitution, and attorneys are required by  
 28 professional ethics requirements not to violate the law, especially DC and California attorneys

1 who are required not to discriminate in the practice of law. *See e.g.*, 5 U.S.C. § 3331; Cal. Rules  
 2 of Prof'l Conduct r. 5.1, 5.3, and 8.4.1. Defendants acted outside of their responsibilities as  
 3 government attorneys and employees in mistreating others by violating discrimination laws, the  
 4 US Constitution, and other laws. *Loper* held that it is the role of the judiciary (not the executive  
 5 branch) to determine who can be sued where there is silence by Congress, as the judiciary and  
 6 executive branch are both part of the sovereign. *Loper*, 144 S. Ct. at 2248.

7 Dismissing the case based on sovereign immunity would enable discriminatory policies  
 8 and practices. For example, women of color who engaged in protected activity in OCC (e.g.,  
 9 Plaintiff and Toshia Cooper in *Cooper v. Nielsen*) were denied access to breaks (including  
 10 bathroom usage) while they worked in OCC while white men who did not engage in protected  
 11 activity were not so treated. *See Cooper v. Nielsen*, 298 F. Supp. 3d 197 (D.D.C. 2018). No  
 12 federal agency or the Courts would permit claims by these marginalized employees for a separate  
 13 system because the defendants violated several laws instead of only one law, pushing the case  
 14 into an administrative black hole. In a separate but equal system, separate works in theory but not  
 15 in practice. A separate system would not work here because of bureaucratic red tape and the  
 16 inability of federal agencies and individual subunits to think beyond their silos. For instance,  
 17 FEMA could not even handle recognizing that one doctor's note could certify the need for leave  
 18 and the existence of a medical condition that qualified both as a disability under the  
 19 Rehabilitation Act and as a serious health condition under the FMLA without requiring the  
 20 doctor to fill out two separate forms, one for each law. Mr. Scott's 2016 assault of Plaintiff has  
 21 yet to be investigated after more than 8.5 years, and FEMA has yet to complete Plaintiff's FOIA  
 22 request for evidence (one type of document) showing a pattern of dismissing women of color in  
 23 the ADR Division after about 4.5 years. Defendants violated multiple laws with both the FOIA  
 24 request and assault that theoretically should be addressed but have not.

25 Bringing a suit only under the Rehabilitation Act and the Civil Rights Act of 1964 would  
 26 not be sufficient. Whenever an action violated multiple laws, several agencies would only allow  
 27 claims on one of the laws or ignore addressing the allegation despite contrary legal requirements.  
 28 FEMA refused to add to the administrative complaint the restriction of bathroom usage and

breaks, a claim that violated multiple laws (e.g., OSHA, Rehabilitation Act, FMLA, FLSA, and Civil Rights Act). Similarly, OSC claimed that the EEOC would handle the matter (regardless of the specific law) while the EEOC refused to address the issue if the actions only violated specific discrimination laws but no other laws as well. DHS IG also refused to investigate Plaintiff's claims or sent them back to named officials to hold themselves accountable.

Therefore, employers and management could deny employees of color access to bathrooms and subject them to bladder and kidney infections, deny them FMLA leave to address those infections or use the bathroom, and subject them to other adverse actions without recourse. For example, FEMA employees without medical qualifications or factual basis declared infections certified by a doctor did not rise to the level of a serious health condition under the FMLA even though a specific medical condition was not required for FMLA eligibility. Plaintiff met the definitions of a serious health condition and eligibility requirements for leave under the FMLA, but unqualified members of FEMA management took it upon themselves to make medical determinations. Such red tape led effectively to segregation (a separate but equal system). Employees like Plaintiff could theoretically file a complaint. However, they would have such claims omitted and might have to wait a decade before even being heard, only to potentially have claims dismissed under the sovereign immunity defense. A minuscule number of plaintiffs would make it to this stage. Where multiple interpretations exist and one interpretation of a law violates another law, the interpretation that violates another law shall not be upheld. *See Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d at 790. Therefore, Plaintiff urges the Court to adopt the interpretation that would not enable Defendants to evade liability and create this separate system that labels some citizens as second-class citizens.

*(c) Federal Sovereign Immunity Here Violates Policy, Regulation, and Statute*

Per 28 C.F.R. § 50.15, the government may not assert any legal defense or position against the interest of the United States. Federal sovereign immunity in this type of case is one such legal defense that Defendants should not be able to raise because it directly acts against the interests of the United States. The federal government has consistently claimed that it has aimed to be a “Model Employer.” See 29 C.F.R. § 1614.203(c); Office of Pers. Mgmt. *Strategic Plan*

1 *FY 2022-2026 Goal 1 Position the Fed. Gov't as a Model Emp'r*, <https://www.opm.gov/about-us/reports-publications/agency-plans/strategic-plan/goal-1-position-the-federal-government-as-a-model-employer/> (Mar. 2022); US Merit Sys. Protect. Bd., *The Fed. Gov't: A Model Emp'r or a Work in Progress? Perspective from 25 years of the Merit Sys. Principles Survey* (2008). When perpetrators feel like their organizations have a lenient stance toward discrimination (e.g., lack of sanctions), perpetrators feel empowered to discriminate. Inez Dekker & Julian Barling, *Personal & org. Predictors of Workplace Sexual Harassment of Women by Men*, JOURNAL OF OCCUPATIONAL HEALTH PSYCHOLOGY, 3(1), 7–18 (1998), <https://doi.org/10.1037/1076-8998.3.1.7>

2 A perpetrator's perceptions of organizational sanctions (or lack thereof) predict

3 harassment. *Id.* Because the perpetrators of discrimination know they will be protected from

4 litigation or other consequences, asserting this defense creates the exact environment that makes

5 perpetrators feel empowered to continue and escalate discrimination without consequence like

6 what happened at FEMA where Defendants tried to make Plaintiff take intrusive physical and

7 mental exams (e.g., pelvic exams, EKG), threatened to investigate her, and tried to scapegoat a

8 black woman who was not involved in the harassment but associated with Plaintiff after she

9 reported discrimination (including discriminatory assault) to security, amongst others.

10 Defending misconduct by individual defendants who violate discrimination laws, the

11 Constitution, other laws, and professional responsibility rules while going after victims who

12 allege discrimination based on their protected characteristics is antithetical to the government's

13 stated position in advancing equity, retaining those with disabilities, and being a Model

14 Employer. *See* Section (II)(b)(i) of Exec. Order. No. 14091, 3 C.F.R. § 14091 (February 16,

15 2023); Exec. Order No. 13985, 88 F.R. 10825 (January 20, 2021) (orders the federal government

16 to “coordinate Government-wide efforts to advance equity.”). If both sides of a lawsuit have

17 been employees of the government, who is to say which has more right to speak for the

18 government? Claiming that the perpetrator defendants are speaking for the government but the

19 plaintiff victims (who are trying to uphold the law) are not would amount to a failure of equal

20 protection and disparate impact or treatment between those who uphold the law (through

21 protected activities or are part of protected classes but take no discriminatory actions) and those

who do not. This is because only the most egregious cases would make it to court and where defendant perpetrators (likely in positions of power) refuse to learn their lessons. This is because perpetrators would not file a lawsuit against themselves or their victims for their own violations of the law. In addition, complaints likely would not go through the entire administrative process and become a lawsuit if management supported victims in stopping, correcting, or preventing a hostile workplace. Minor cases would not make it to court because most people would not wait 10 years to see justice for a fake or minor issue (e.g., a technicality), or such cases would have been settled. If anything, courts should take official government policy (not the self-interested positions of perpetrator employees) as the official word of government position.

*(d) Constitutional Rights*

Defendants misunderstand that statutes must authorize the Court’s ability to review the US Constitution. U.S. CONST. art. III § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution”). Statutes and regulations do not supersede the US Constitution. *See McCulloch v. Maryland*, 17 U.S. 316 (1819). The extent of statutes and laws must not exceed the bounds of the Constitution. *See id.* In other words, the Constitution dictates the scope of statutes and not vice versa. As found in *Marbury v. Madison*, federal courts have the power to review the constitutionality of executive behavior and statutes therein. *Marbury v. Madison*, 5 U.S. 137 (1803). The right of federal courts (including District Courts) to review federal executive action and the constitutionality of statutes means that Plaintiffs are allowed to sue the federal government about such federal action and the constitutionality of statutes because federal courts do not provide advisory opinions. Plaintiffs must have standing to sue. Courts can enforce claims of violations of Constitutional rights even without an enabling statute to waive sovereign immunity. *Obergefell v. Hodges*, 576 U.S. 644 (2015) (“the Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter, and an individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.”). *See also Davis v. Passman*, 442 U.S. 228, 240-245 (1979). Even so, 28 U.S.C. § 1343(3) is a statute that specifically authorizes district courts original jurisdiction over constitutional

1 claims. In addition, sovereign immunity does not cover "[s]uits that charge federal officials with  
 2 unconstitutional acts" because unconstitutional acts are "necessarily" outside of the officials'  
 3 official capacity. *U.S. v. Yakima Tribal Ct.*, 806 F.2d 853, 859 (9th Cir. 1986) (citing *Larson v.*  
 4 *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 and 696-97 (1949)). *See also Adams*,  
 5 165 F. Supp. 3d at 919. "If Congress wishes to deny federal employees the ability to redress  
 6 alleged constitutional violations, it must state its intention clearly." *AFGE Local 1 v. Stone*, 502  
 7 F.3d 1027, 1029 (9th Cir. 2007).

8 1<sup>st</sup> Amendment litigation is common, so it must be the case sovereign immunity does not  
 9 apply in 1<sup>st</sup> Amendment cases as the 1<sup>st</sup> Amendment only applies to government (not private)  
 10 action against citizens. As noted in § II(5)(d) above, sovereign immunity does not or should not  
 11 apply to Constitutional claims. Moreover, under 42 U.S.C. § 1983, a plaintiff may bring a claim  
 12 against public officials who, acting in their official capacity, retaliate against, obstruct, or chill  
 13 the plaintiff's 1<sup>st</sup> Amendment rights. This principle is well-established in case law, as seen in  
 14 *Arizona Students' Association v. Arizona Board of Regents*, where the 9th Circuit held that "a  
 15 plaintiff may bring a Section 1983 claim alleging that public officials, acting in their official  
 16 capacity, took action with the intent to retaliate against, obstruct, or chill the plaintiff's First  
 17 Amendment rights." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir.  
 18 2016). The 1<sup>st</sup> Amendment to the US Constitution guarantees that citizens have the right to be  
 19 free from governmental actions taken to retaliate against the exercise of 1st Amendment rights or  
 20 to deter them from exercising those rights in the future. The 9<sup>th</sup> Circuit affirmed this in *Sloman v.*  
 21 *Tadlock*, stating that "under the First Amendment, a citizen has the right to be free from  
 22 governmental action taken to retaliate against the citizen's exercise of First Amendment rights or  
 23 to deter the citizen from exercising those rights in the future." *Sloman v. Tadlock*, 21 F.3d 1462,  
 24 1469-70 (9th Cir. 1994). Therefore, 1<sup>st</sup> Amendment claims should be allowed to proceed.

25 (e) 42 U.S.C. §§ 1981, 1983, 1985, and 1986

26 Claims brought under 42 U.S.C. § 1981-6 should stand both against the federal  
 27 government and individual defendants. As stated above, federal sovereign immunity should not  
 28 exist at all. Even if the Court were to find that not to be the case, federal sovereign immunity

1 should not be found for 42 U.S.C. §§ 1981, 1983, 1985, and 1986 for the following reasons. 42  
2 U.S.C. § 1988 specifies remedies (attorney's fees and expert fees) for winning cases under 42  
3 U.S.C. §§ 1981, 1983, 1985, and 1986. *See Kirtz*, 601 U.S. 42. This implies that cases must be  
4 able to be brought to win a lawsuit, which would mean that the Court would have jurisdiction to  
5 hear these cases and that federal sovereign immunity does not apply to these cases. An explicit  
6 waiver of immunity is not required, especially when reading that 42 U.S.C. §1981-6 provisions  
7 address fundamental rights, authorizing suits based on Constitutional violations. *Obergefell v.*  
8 *Hodges*, 576 U.S. 644 (2015). 42 U.S.C. §§ 1983 and 1985 impose liability upon a person, and a  
9 federal agency is not a person within the meaning of these provisions. *Jachetta v. U.S.*, 653 F.3d  
10 898, 902 (9th Cir. 2011).

i. 42 U.S.C. § 1981

12 Prior cases allowing federal sovereign immunity for § 1981 were wrongly decided or  
13 overturned considering recent US Supreme Court cases *Obergefell* and *Loper* requiring or  
14 allowing judicial review (including of executive branch activities) without any authorizing  
15 statute or deference to the executive branch. *See Obergefell v. Hodges*, 576 U.S. 644 (2015);  
16 *Loper*, 144 S. Ct. at 2248. Moreover, the cases that dismissed claims under § 1981 dismissed  
17 claims in conjunction with other 42 U.S.C. provisions for the same reasons, but other cases have  
18 upheld suits under the other 42 U.S.C. provisions. For example, it is inconsistent to allow a 42  
19 U.S.C. §1985 and 1986 claim but not a § 1981 claim although none of them explicitly waive  
20 sovereign immunity in their own statutes but rather waiver is present through other statutory  
21 conditions (or waiver is not required at all). *See Bowie v. Maddox*, 642 F. 3d 1122 (DC Cir.  
22 2011). Therefore, it is inconsistent and arbitrary to dismiss some claims but not others although  
23 all claims are in the same situation.

ii. 42 U.S.C. § 1983

25 42 U.S.C. § 1983 is often used as the jurisdictional basis for constitutional claims, so they  
26 must be allowed as stated in § II(5)(d) above. “A plaintiff may bring a Section 1983 claim  
27 alleging that public officials, acting in their official capacity, took action with the intent to  
28 retaliate against, obstruct, or chill the plaintiff’s First Amendment rights.” *Ariz. Students’ Ass’n*

1 *v. Ariz. Bd. of Regents*, 824 F.3d at 867**Error! Bookmark not defined.** Even if the Court does  
 2 find immunity for the federal government, individuals are not immune because they are not  
 3 agencies. *See* § II(2) above regarding the right to sue and individual defendants under § 1983.

4 ***iii. 42 U.S.C. § 1985***

5 28 U.S.C. § 1333 specifically provides district courts jurisdiction over claims related to  
 6 42 U.S.C. § 1985. A DC Circuit case, where FEMA/DHS headquarters sits, *Bowie v. Maddox*  
 7 held that a federal employee could sue a federal agency under 42 U.S.C. § 1985 in addition to a  
 8 Title VII claim, overturning the district court ruling of only allowing a Civil Rights Act of 1964  
 9 (Title VII) claim to proceed, dismissing all other claims including the claim based on 42 U.S.C. §  
 10 1985. *Bowie v. Maddox*, 642 F. 3d 1122 (DC Cir. 2011). Furthermore, immunity does not  
 11 extend to federal employees sued as individuals who use their office to violate the Constitution.  
 12 *See Kenyatta v. Moore*, 623 F. Supp. 224 (S.D. Miss. 1985).

13 ***iv. 42 U.S.C. § 1986***

14 Moreover, the court in *Bowie v. Maddox* only upheld the dismissal of the claim based on  
 15 42 U.S.C. § 1986 because the plaintiff in the case did not state enough facts to support the claim  
 16 but the circuit would have allowed the § 1986 claim because it did not dismiss the claim based  
 17 on a defense of sovereign immunity. *Bowie v. Maddox*, 642 F. 3d 1122 (DC Cir. 2011).

18 ***(f) Equal Pay Act (EPA) and Fair Labor Standards Act (FLSA)***

19 Any claims based on the EPA should not be dismissed based on sovereign immunity  
 20 because the EPA is an amendment to the FLSA, and the FLSA expressly waives sovereign  
 21 immunity to be brought in “any federal or state court of competent jurisdiction.” *Tallacus v. U.S.*,  
 22 113 Fed. Cl. 149, 2013 WL 5665260 (Fed. Cl. 2013).

23 ***(g) 22 U.S.C. § 7102(8) (Involuntary servitude)***

24 22 U.S.C. § 7102(8) is the statutory version of the 13<sup>th</sup> Amendment that outlaws slavery.  
 25 Since the right to be free from slavery is a fundamental right that courts may review, by  
 26 extension 22 U.S.C. § 7102(8) is also such a statute. *See Obergefell*, 576 U.S. at 677.

27 ***(h) Privacy Act/FOIA***

28 Executive branch policy favors disclosing documents, so arguments of sovereign  
 immunity for FOIA/Privacy Act cases should not apply. Exec. Order No. 13,392, 70 F.R. 75373  
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(February 14, 2005) (“The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed.”). “Further, the Freedom of Information Act and the Privacy Act, 5 U.S.C. §§ 552 and 552a, also create a private cause of action and waive sovereign immunity in certain circumstances related to the creation and disclosure of agency records.” *Kirk v. U.S.* (D.Ariz. Apr. 20, 1998, No. CIV-97-648-PCT-SMM) 1998 U.S.Dist.LEXIS 15423, at \*4 [82 A.F.T.R.2d (RIA) 1998-6563]. Even if not authorized under FOIA or the Privacy Act itself, the APA allows the judiciary to review inactions by the judiciary. *See* § II(4) above.

*(i) “Speak Out Act” and California Silence No More Act (a.k.a. SB 331)*

42 U.S.C. § 19403(b) specifically states that state law (i.e., the California Silence No More Act) is still applicable even where the federal Speak Out Act (42 U.S.C. §§ 19401-19404) applies. Moreover, per California public policy, the same standards for California and federal law apply, especially to California attorneys or those supervising California attorneys (or attorneys from other jurisdictions banning discrimination in the practice of law) working on Plaintiff’s complaint. *Xin Liu v. Amway Corp.*, 347 F. 3d 1125, 1137-8 (9<sup>th</sup> Cir. 2003) (finding the same rationale and standards for California laws should apply to its federal law counterparts).

*(j) California Labor Code § 98.6(b)(1)*

California Labor Code § 98.6(b)(1) is not a claim unto itself but rather a descriptor of how claims should be interpreted in California (a presumption of causality where protected activity occurs within 90 days of discrimination). This code should be adopted here because it would not make sense to have two different interpretations of suspect timing in California under different discrimination laws. *Xin Liu v. Amway Corp.*, 347 F. 3d at 1137-8 (finding the same rationale and standards for California laws should apply to its federal law counterparts).

*(k) Monetary Actions*

Claims should not be dismissed simply because they do not provide monetary remedies since non-monetary remedies are also sought. *See* 5 U.S.C. §§ 702 & 703 (granting the right of judicial review by agencies who have harmed plaintiffs seeking non-monetary damages). In addition to the monetary remedies already discussed under ¶ 11 of the FAC, Plaintiff also has jurisdiction under 28 U.S.C. § 1343, 42 U.S.C. §§ 1981a and 1988, 28 U.S.C. § 1346(a)(2) and

1 (b)(1) (the Little Tucker Act), 28 U.S.C. § 1491 (Tucker Act), and other various statutes.  
 2 Because the judiciary may review Constitutional violations, there is no limitation on monetary  
 3 damages written in the Constitution. *Davis v. Passman* discussed the process for obtaining  
 4 damages for Constitutional violations because it implies that damages are available for  
 5 Constitutional violations. 442 U.S. at 248.

6 **III. FMLA Claims Jurisdiction**

7 Congress has outlined employers' duty under the FMLA and employees' right to FMLA  
 8 leave. Refusing to allow individuals to bring FMLA-based cases would violate the Equal  
 9 Protection clause of the US Constitution. Since such constitutional violations are impermissible,  
 10 as noted in § II(5)(d) above, all FMLA claims must be allowed. Courts have found personal  
 11 liability for supervisors under the FMLA, including in the public sector. *See Aguirre v.*  
 12 *California, Case No. 16-cv-05564-HSG (N.D. Cal. Nov. 16, 2017); Haybarger v. Lawrence Cnty.*  
 13 *Adult Prob. & Parole*, No. 10-3916, 2012 U.S. App. LEXIS 1776 (3d Cir. 2012). Thus, even if  
 14 claims against the federal government are dismissed due to sovereign immunity, they should  
 15 continue against supervisory employees personally, including HR members and lawyers  
 16 involved in supervisory decisions, as discussed in § II(2) above.

17 FEMA classifies CORE employees as exempt from Title 5 provisions, creating ambiguity  
 18 about whether Plaintiff falls under Title I or Title II of the FMLA. FEMA, *Cadre of On-Call*  
 19 *Response/Recovery (CORE)*, <https://www.fema.gov/careers/paths/core>. During periods without a  
 20 contract between July 13, 2016, and September 25, 2016, Plaintiff likely qualifies as a Title I  
 21 employee based on definitions in 5 U.S.C. § 630(b)(2)(ii) because she would be “[a]n employee  
 22 serving under a temporary appointment with a time limitation of 1 year or less.” Rather, FEMA  
 23 retroactively extended Plaintiff’s job (in periods of less than 1 year) after her contract expired  
 24 like a month-to-month arrangement after a rental contract ends. *See* FAC at ¶¶ 229, 235, 242,  
 25 and 244. However, during contract periods, classification under Title I or Title II depends on the  
 26 interpretation of the meaning of “intermittent” and whether that definition applies to CORE  
 27 employees when they are exempt from Title 5 terms. *See* 5 C.F.R. § 630.1201(b)(2)(iii); 5 U.S.C.  
 28

1   § 340.401(b). FEMA’s intent to terminate Plaintiff shortly after she initiated an EEO complaint  
 2 and requested FMLA leave suggests discrimination. *See* FAC at ¶¶ 229, 235, 242, & 244.

3       If Plaintiff’s employment fell under Title I of the FMLA, sovereign immunity would not  
 4 apply as Defendants agree that courts have found a waiver of immunity in such cases. *See*  
 5 Motion to Dismiss at 19. Under a Title I classification, the statute of limitations should be from  
 6 when Plaintiff first tried to exhaust her administrative remedies and not the date of filing in court  
 7 because of the length of time it took to exhaust her remedies. If classified under Title II instead,  
 8 the recent decision in *Loper*, which overturned deference to the executive branch, should allow  
 9 reconsideration of FMLA Title II precedents that deferred to the executive branch in finding  
 10 federal sovereign immunity in such cases. *Loper*, 144. S. Ct. 2244.

11       The current case also can be distinguished from previous cases Title II cases. The  
 12 *Hartlzer v. Mayorkas* case cited by Defendants involving a FEMA employee likely involved an  
 13 employee of a different classification (competitive service not a CORE as Plaintiff was) because  
 14 the case mentioned that the FEMA employee received a PIP, which is not an administrative  
 15 action given to CORE employees but only title 5 (permanent or competitive service) employees  
 16 who are covered until Title II of the FMLA. *Hartzler v. Mayorkas*, 2022 WL 15419995 (D.D.C.  
 17 2022). Furthermore, while other Title II FMLA cases could have decided that federal sovereign  
 18 immunity applies in those cases, it should not apply to this case because of the perverse  
 19 discriminatory outcome that would result as discussed in *Brock*, which was discussed earlier in  
 20 this section. *Brock v. U.S.*, 64 F.3d at 1423.

21       Dismissing Plaintiff’s FMLA claim is inconsistent with the spirit of the FMLA. Congress  
 22 drafted the FMLA to enable leave for those with medical reasons, minimize discrimination based  
 23 on sex related to medical reasons “consistent with the Equal Protection Clause of the Fourteenth  
 24 Amendment,” and promote “equal opportunity for men and women.” 28 U.S.C. § 2602.  
 25 Violating the FMLA would also be a violation of California public policy. *Xin Liu v. Amway*  
 26 *Corp.*, 347 F. 3d at 1137-8. Dismissing the claim would risk unequal access to FMLA  
 27 protections based on discriminatory or retaliatory factors even if such claims could proceed  
 28 under the FMLA. *See Brock v. U.S.*, 64 F.3d at 1423. If the FMLA claim were not allowed to

1 proceed, then the perverse incentive of blocking women, those with medical conditions, and  
 2 those who engage in protected activity (whom the law was designed to protect) from unfettered  
 3 access to leave and protections under FMLA while allowing others unfettered access to FMLA  
 4 leave and protections. *Brock v. U.S.*, 64 F.3d at 1423. In addition, CORE employees like  
 5 Therefore, the result would be a separate but equal system with a disparate impact on those who  
 6 do not face discrimination or bring discrimination claims versus those who do.

7 Even if Title II itself does not grant sovereign immunity, the Little Tucker Act, Civil  
 8 Serv. Reform Act, Mandamus Act, and the Civil Rights Act of 1964 do. 28 U.S.C. § 1346(a)(2);  
 9 5 U.S.C. ch. 11; 28 U.S.C. § 1361; 42 U.S.C. §§ 2000d & 2000e et seq. Case law has also found  
 10 sovereign immunity in previous cases even without an explicit grant of such sovereign immunity.  
 11 *Kirtz*, 601 U.S. 42. The federal government has a duty to provide its employees with the benefits  
 12 (including leave) it (and statutes and other regulations) states it will provide and in the way that it  
 13 will be provided (i.e., without interference or retaliation). Otherwise, the government would be  
 14 falsely advertising jobs. Therefore, Plaintiff's case should proceed against both federal agencies  
 15 and individual defendants. Additionally, even if FMLA claims against the federal government  
 16 are dismissed, they may proceed under other laws. Therefore, the interpretation that best aligns  
 17 with the FMLA's purpose to protect employees facing discrimination should be adopted.

18 **IV. Failure to State a Claim (FRCP 12(b)(6))**

19 Contrary to Defendants' argument, stating too many facts or drafting the complaint in  
 20 Defendants' desired structure or format are not bases for dismissing a claim under Rule 12(b)(6).  
 21 A legal recitation in a complaint is not required but rather only a demonstration of the facts to  
 22 state a claim. The US Supreme Court has held that a *prima facie* case (including comparators) in  
 23 a discrimination case is not required in a complaint. See *Swierkiewicz v. Sorema*, 534 U.S. at  
 24 510. The 9th Circuit has found that setting up a *McDonnell Douglas* burden-shifting framework,  
 25 as Defendants seem to suggest, is not appropriate in Title VII jury cases, as is currently the case  
 26 here. See *US Ct. for the Ninth Circuit, Manual of Model Civil Jury Instructions, Ch. 10*,  
 27 <https://www.ce9.uscourts.gov/jury-instructions/node/166> (citing *Costa v. Desert Palace, Inc.*,  
 28 299 F.3d 838, 855 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003), *Sanghvi v. City of*

1 *Claremont*, 328 F.3d 532, 540 (9th Cir. 2003)). Moreover, such a framework is not applicable in  
 2 cases of per se discrimination or where there is direct evidence of discrimination as is the case  
 3 here (e.g., jokes about how a woman's place is in the kitchen or when Erika Jordan said she had  
 4 to give her permission before Plaintiff could report up to management about discrimination,  
 5 including against Ms. Jordan herself). *See* FAC ¶ 193 at 46.

6 The US Supreme Court has repeatedly restated that a complaint drafted by a pro se  
 7 plaintiff should not be dismissed for failure to state a claim unless it "appears beyond doubt that  
 8 the plaintiff can prove no set of facts in support of his claim that would entitle him to relief" and  
 9 that such pleadings should be held to a lower standard than pleadings drafted by represented  
 10 parties. *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972) (citing *Conley v. Gibson*, 355 U.S. at  
 11 45-46). *See also Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997); *Estelle v. Gamble*,  
 12 429 U.S. 97 (1976). Even so, Plaintiff has provided more than enough facts that would entitle her  
 13 to relief for each element of proof for each basis that Defendants name for a FRCP 12(b)(6)  
 14 dismissal. Since Defendants only argued regarding disparate treatment (Title VII, Rehabilitation  
 15 Act, FMLA ), retaliation, and HWE, no FRCP 12(b)(6) dismissals should be made on any basis  
 16 of discrimination not discussed by Defendants (e.g., interference, failure to accommodate, quid  
 17 pro quo harassment, retaliatory harassment, disparate impact). *See Sanders v. City of Newport*,  
 18 657 F.3d 772 (9th Cir. 2011) (noting that interference and retaliation claims are separate).

19 Contrary to Defendants' argument that it was "impossible" to match elements of a prima  
 20 facie element of each claim to a fact, Plaintiff has labeled each claim with a theme (e.g.,  
 21 "Assault/physical intimidation by a supervisor (retaliation/interference, discrimination based on  
 22 sex/gender, color, race, disability, and national origin" for the second claim), which provides a  
 23 clear descriptor of the issue for each claim. For some claims, even if the FAC refers to other  
 24 paragraphs, it is self-explanatory what the action at issue is because it is in the title (assault by a  
 25 supervisor), referred to in the claim itself, and only once instance as with Claim 2. Claim 2's title  
 26 includes assault by a supervisor, FAC ¶ 285 details the assault/physical intimidation, details the  
 27 suspect timing of the assault and direct evidence of assault (FAC ¶ 285 & 294), and details  
 28 comparators to Plaintiff's protected classes and activity (e.g., FAC ¶ 298-301). The top of the

1 claim (e.g., FAC ¶ 284 for claim 2) also specifically referenced paragraphs that are most relevant  
 2 to that specific claim. The FAC should not need to repeat Plaintiff's protected classes and  
 3 qualifications for every claim when those things can save space when incorporated by reference.

4 *See e.g.*, FAC § VI (listing the bases of discrimination); FAC ¶ 86 (Plaintiff's qualification).

5 Plaintiff reduced the FAC by 10 pages by referencing facts already mentioned elsewhere.

6 (1) Title VII Disparate Treatment

7 Plaintiff incorporated other parts of the FAC by reference because she correctly  
 8 anticipated that Defendants would ask Plaintiff to overexplain, as has been the case. While it  
 9 should be self-explanatory about which *prima facie* elements are references or can be inferred  
 10 (e.g., providing comparators of treatment of Plaintiff compared to those of other protected  
 11 classes not only discusses the comparators but also the protected classes at issue), Plaintiff also  
 12 references other sections of the FAC (e.g., § VI) if Defendants claim that they cannot discern that  
 13 Asian is a race FAC (¶ 30). In reference to claim 1, contrary to Defendants' allegations, Plaintiff  
 14 showed many examples of comparators. *E.g.*, FAC ¶¶ 253-258, 260-271, 273-277, 279, 282-  
 15 283). Elsewhere in the FAC, Plaintiff even used specific words indicating comparators, such as  
 16 seen in FAC ¶ 125, 274, 422, 463, 517, 647, 811, 875(vii), & 930. More examples could still be  
 17 revealed in discovery. More examples could have been revealed had FEMA conducted an  
 18 official investigation, not tried to destroy evidence, or disclosed the information to Plaintiff's  
 19 requests. From these comparators, from the title of the claim, and specifically incorporated facts  
 20 (FAC ¶ 251 for claim 2), one can figure out the adverse actions involved in the claim (e.g.,  
 21 changing the advertised job description from ADR attorney advisor to an administrative or  
 22 housekeeping position for women, especially women of color). It is for the jury to decide  
 23 whether Plaintiff meets the burden of proof for an adverse action, so claims not be dismissed at  
 24 the complaint drafting stage just because Defendants think that an element of the claim does not  
 25 fit their definition (i.e., does not meet the burden for proving an adverse action).

26 Plaintiff can clarify which claims were adverse actions for each claim. However, if  
 27 Plaintiff does so, this would significantly increase the length of the complaint. Defendants can  
 28

1 simply argue against something as an adverse action instead of requiring Plaintiff to do so.

2 Plaintiff is amenable to listing more examples not listed.

3 (2) Rehabilitation Act Disparate Treatment

4 Contrary to Defendants' argument, Plaintiff labeled the basis of her claims, stating a  
 5 failure to accommodate in the claim titles where applicable (e.g., Claim 24). Even if Plaintiff did  
 6 not title the bases of the claims, one can determine the basis of the claim based on the facts  
 7 described in the claim and eliminate based on the title (e.g., Claim 3, which is named "hostile  
 8 work environment," is talking about HWE and not another basis, such as failure to  
 9 accommodate). Rule 12(b)(6) does not require that the facts to meet the prima facie elements  
 10 need to be in a specific order to avoid dismissal, only that there need to be enough facts.

11 (3) FMLA Disparate Treatment

12 Contrary to Defendants' claim, Plaintiff states why she is bringing a claim on FMLA  
 13 (e.g., FAC ¶ 30; Claim 22, Line 4), and Defendants themselves also repeated. For example, claim  
 14 27's title "Retaliation/interference for requesting accommodations and exercising FMLA rights"  
 15 states the relationship of the claim to the exercise of FMLA rights and describes how Ms. Jordan  
 16 claimed that Plaintiff could only exercise reasonable accommodations or FMLA rights, but not  
 17 both. Additional facts beyond that are not required under even the prima facie case Defendants  
 18 recite although that set of prima facie elements (denial of FMLA leave) is not the only way to  
 19 prove retaliation or interference under FMLA. For example, in claim 9, non-payment for work  
 20 after Plaintiff tried to exercise her FMLA rights or to prevent Plaintiff from exercising those  
 21 rights is clearly an adverse action. The same adverse actions under Title VII and the  
 22 Rehabilitation Act for claims 16, 18, 21, 22, and so forth for retaliation/interference within the  
 23 same suspect timing would apply to FMLA retaliation/interference as well. The FAC clearly  
 24 claims that Plaintiff was denied leave (interference) because leave was not initially granted, and  
 25 delay is a denial. *E.g.*, FAC ¶ 197, 637. If Plaintiff were to split into multiple claims (one law per  
 26 claim) based on the same event, the resulting complaint would be exponentially longer with  
 27 repetitive elements as described in § I about Rule 8.

1           Moreover, the *prima facie* elements that Defendants cite only relate to one type of  
 2 retaliation, but not for all types of interference and retaliation. For example, FMLA interference  
 3 can take many forms including, for example, using FMLA leave as a negative factor in hiring,  
 4 promotions, disciplinary actions, and no-fault attendance policies. *See* 29 C.F.R. § 825.220(c).”  
 5 *Olson v. U.S. & MBO Partners, Inc.*, 980 F. 3d 1334 (9<sup>th</sup> Cir. 2020). *Xin Liu v. Amway Corp.*,  
 6 347 F. 3d 1125, 1133 (9<sup>th</sup> Cir. 2003) (The US Department of Labor “interprets ‘interference’ to  
 7 include ‘not only refusing to authorize FMLA leave, but discouraging an employee from using  
 8 such leave.’”). In addition, the FMLA specifically allows for “unforeseeable leave” that only  
 9 requires “notice to the employer as soon as practicable,” a topic common enough to create an  
 10 entire section in regulation on the matter. 29 C.F.R. § 825.303.

11           (4)     Retaliation

12           As stated above in § (2) and (3), one incident could violate multiple laws. Given her  
 13 intersectional identity, Plaintiff is not required to erase part of her identity to fit in a box by  
 14 arbitrarily claiming that Defendants only violated one law or did so on one protected basis at a  
 15 time. For example, her participatory protected activity of filing an EEO complaint listed all  
 16 relevant bases of discrimination. Contrary to Defendants’ claim, retaliation is based on protected  
 17 activity, not categories, so naming those categories in retaliation claims is not required. Even so,  
 18 one can infer which categories are related when a plaintiff complains about offensive jokes,  
 19 behavior, and comments about specific protected categories. *See e.g.*, FAC § VI, ¶ 6.

20           Defendants’ claim that the claims are too vague is simply not the case. For example, in  
 21 claim 2 ¶ 285, The FAC stated, “On March 22, 2016, one day after Plaintiff initiated the EEO  
 22 process, Plaintiff’s supervisor Robert Scott assaulted/physically intimidated Plaintiff while  
 23 telling her that she should not have documented (i.e., written down in an email) her allegations of  
 24 discrimination.” For the same claim, the FAC specified the protected bases and activity upon  
 25 which Plaintiff made her claim with the specific laws at issue. FAC, at ll. 2-6. The FAC included  
 26 similarly specific titles, laws addressed, facts for each claim, specified retaliatory actions, and  
 27 used the word retaliation in the claim body and titles. *See e.g.*, FAC ¶ 573 at 116. The statement  
 28

1 of facts, procedural history, or the claims themselves clearly show the suspect timing where  
 2 protected activity predates adverse actions. *See* FAC §§ VII, VIII, & IX.

3 As stated above, the only requirement for a 12(b)(6) dismissal is not having enough facts  
 4 to state a claim, not whether the claims were in a format that Defendants prefer. The case  
 5 *Mannat v. Bank of America* that Defendants cite to support its point did not state that each claim  
 6 could cite one law. *See Mannat v. Bank of Am.*, 339 F.3d 792, 800 (9<sup>th</sup> Cir. 2003). As stated  
 7 above in § I, while Plaintiff could separate out each per type (e.g., retaliation) per event per law  
 8 (e.g., Rehabilitation Act, Civil Rights Act), this could simply make the complaint longer for the  
 9 same elements given many instances related to intersectional protected categories.

10 (5) **Hostile Work Environment**

11 Defendants fundamentally misunderstand the standard for an HWE and when such a  
 12 standard must be met. None of the so-called requirements Defendants named are in the 9<sup>th</sup>  
 13 Circuit's jury instructions for the required *prima facie* elements of an HWE. *See* U.S. Ct. for the  
 14 Ninth Cir., *Manual of Model Jury Instructions*, 10.5 Civil Rights—Title VII—Hostile Work Env't,  
 15 <https://www.ce9.uscourts.gov/jury-instructions/node/666>. A jury's job is to determine the facts  
 16 and whether the conduct constitutes HWE, so dismissal at this stage is premature and not to be  
 17 resolved this early in litigation. *Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643 (9th Cir. 2021).

18 Unlike Defendants' claim, it is not a requirement that the defendants have identical  
 19 methods of discrimination for all of their actions for the same protected basis in an HWE case.  
 20 Defendants miss the meaning of pattern and practice of discrimination by erroneously equating it  
 21 to the same MO for every discriminatory act (as in a class action case), instead of a totality of  
 22 circumstances that give rise to an HWE. *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995)  
 23 (*citing Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) ("Hostility must be measured based on the  
 24 totality of the circumstances.")). Even so, reports by DHS's IG and the RAND found widespread  
 25 harassment across FEMA (supported by statistics) and show the type of pattern and practice of  
 26 discrimination Defendants seek. *See e.g.*, DHS IG, OIG-21-71, *FEMA Must Take Additional*  
 27 *Steps to Better Address Emp. Allegations of Sexual Harassment & Sexual Misconduct* (2021);  
 28 Rand Corp., RAND\_RBA383-1, *Harassment & Discrimination in the FEMA Workplace* (2020).

1 Defendants also misread the *Porter* case in incorrectly believing HWE claims must  
 2 exclude discrete acts. *Porter v. Cal. Dep’t of Corr.*, 419 F.3d 885, 893 (9th Cir. 2005) (“Of  
 3 course, discrete acts still may be considered”). The passage of SB1300 should have overturned  
 4 *Porter*’s requirement including non-discrete acts to form the basis of a HWE claim because  
 5 SB1300 overturned the 9th Circuit’s opinion *Brooks v. City of San Mateo*, stating that one  
 6 incident is not enough to create an HWE. *Id.* at 893. *See also* CAL. GOV’T CODE § 12923(b);  
 7 *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000). In addition, SB1300 (passed in 2018)  
 8 found that in California, an HWE is determined by the harm to the victim, not the severity of the  
 9 act by the perpetrator, which is the standard Defendant is trying to argue. In line with the belief  
 10 that a single discrete instance can constitute an HWE even for Civil Rights Act of 1964 claims,  
 11 the 9th Circuit reiterated the stance multiple times, especially noting that assault (as is the case  
 12 here) alone is enough for a finding of an HWE, and assault can be considered a discrete act.  
 13 *Chesier v. On Q Fin. Inc.*, 382 F. Supp. 3d 918 (D. Ariz. 2019); *Hughes v. Pair*, 46 Cal.4th 1035  
 14 (Cal. 2009). California has consistently interpreted its state and federal discrimination standards  
 15 the same. *See Hughes v. Pair*, 46 Cal.4th 1035 (Cal. 2009). *See also* CAL. GOV’T CODE §  
 16 12923(b) (“The legal standard for sexual harassment should not vary by type of workplace.”).

17 Defendants’ arguments further falter when they themselves acknowledge the numerous  
 18 discriminatory acts (corroborated by various DHS officials) that Plaintiff has identified. Contrary  
 19 to their assertion, listing multiple instances of discrimination lends credence to the pervasive and  
 20 continuous nature of the harassment. Contrary to Defendants’ claims, the FAC has more than  
 21 sufficiently stated a claim for harassment, including by describing physical and verbal harassing  
 22 conduct. For instance, stalking, assault, battery, trapping Plaintiff in her cubicle, Defendants’  
 23 comments and jokes about national origin, race, color, and gender, and telling her to stop  
 24 documenting discrimination are by nature discriminatory, not a “usual set of activities” unrelated  
 25 to discrimination. Defendants’ misinterpretation of the law and reliance on outdated legal  
 26 standards cannot obscure the reality that these acts, taken together, paint a clear picture of an  
 27 ongoing HWE. Therefore, Defendants’ motion to dismiss must be denied.

28 **V. Judicial Notice**

1 While the EEOC decisions provide context on the current case, when ruling on a motion  
2 to dismiss, a district court should not look beyond the four corners of a complaint. *See Swartz v.*  
3 *KPMG LLP*, 476 F.3d 756, 763 (9th Cir.2007); *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th  
4 Cir.2001). Particularly, the EEOC decisions should not persuade the Court to dismiss the case  
5 and take the decisions with a grain of salt because of its lopsided view of evidence upon which  
6 the EEOC decisions were based and serious due process deficiencies in the agency complaints  
7 process, such as allowing those named as perpetrators in the discrimination complaint or their  
8 subordinates to draft the charge or oversee the processing of the complaint. Since Plaintiff  
9 initiated the EEOC process in 2016, FEMA, the DHS IG, and the EEOC have yet to initiate an  
10 investigation into Plaintiff's specific allegations. In addition, the EEOC refused to allow  
11 discovery during the hearings process and the EEOC AJ Woodham refused to allow Plaintiff (the  
12 non-sanctioned party) to present all of her evidence and rebuttal showing pretext while allowing  
13 the Defendant FEMA/DHS (the sanctioned party) to present evidence on the merits after a  
14 default judgment, including allowing blatantly false information and perjured testimony.

## 15 | VI. Factual Corrections

16 Defendants misstated that Plaintiff currently has cancer. She has been in remission now  
17 and when she worked at FEMA. Defendants also misstated that her allegations of disability only  
18 relate to PTSD and cancer. Plaintiff also brought her claim based on being regarded as having  
19 disabilities (mental or emotional) that she did not have.

## 20 | VII. Summary of Request

21 Plaintiff respectfully requests that Defendants' request to dismiss be denied and that  
22 Plaintiff be granted leave to amend the complaint and add any additional defendants whose  
23 service will be waived, and Ms. Friend would receive service on behalf of any added defendants.

25 | P a g e  
Respectfully submitted,

27 Date: 10/30/24

Spence Yeh

Jennifer Yeh